

Before The
Federal Communications Committee

RECEIVED

APR 12 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of
Implementation of Section 26 of the)
Cable Television Consumer Protection)
and Competition Act of 1992)

PP Docket No. 93-21

To: The Commission

Inquiry into Sports Programming Migration

REPLY COMMENTS OF PAPPAS TELECASTING COMPANIES

PAPPAS TELECASTING COMPANIES

By: _____
Harry J. Pappas,
President and Chief Executive Officer
500 South Chinowth Road
Visalia, CA 93277
(209) 733 7800

April 12, 1993

No. of Copies rec'd
List A B C D E

0+5

RECEIVED

APR 12 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission

In the Matter of Implementation of Section 26)
of the Cable Television Consumer Protection)
and Competition Act of 1992)

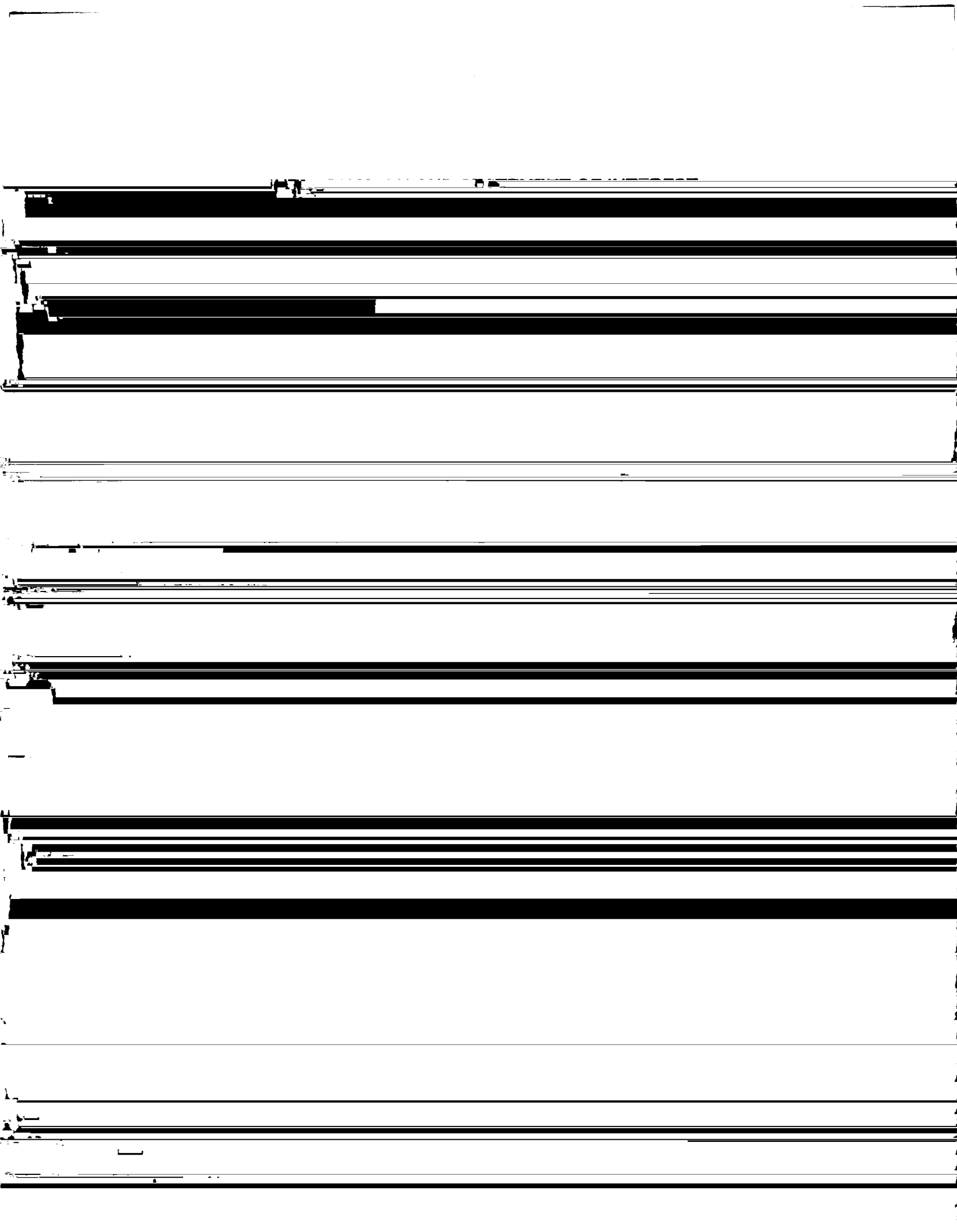
PP Docket No. 93-21

To: The Commission

Inquiry into Sports Programming Migration

REPLY COMMENTS OF PAPPAS TELECASTING COMPANIES

Pappas Telecasting Companies (PTC), hereby files comments in reply to those heretofore filed in response to the Commission's Notice of Inquiry into Sports Programming Migration, FCC 93-21 (released February 9, 1993). The purpose of the Notice of Inquiry ("NOI") was clearly and succinctly stated in the Federal Register (Vol. 58, No. 28, February 12, 1993): "This Notice of Inquiry initiates an inquiry into sports programming migration and the impact of preclusive contracts on the availability of college sports programming to local television stations." (emphasis added). In the Supplementary Information, inter alia, it is stated, "Moreover, the Commission will examine the impact of preclusive contracts between college athletic conferences and video programming vendors on the supply of local college sports programming to local television stations." (emphasis added).



"raison d'etre" of a licensee as a public trustee whose duty it is to serve the tastes, needs and interests of all of the public in its service area by, among other programming, providing sports programming. This the Pappas stations have done. For example, early in its history, KMPH (TV) brought, for the first time, Oakland Athletics, San Francisco Giants, and Golden State Warriors games to San Joaquin Valley residents for their enjoyment. KMPH was the first to broadcast the Fresno State University's home and away football and basketball games, beginning in the early 1980's. KMPH (TV) has for at least the last ten years continuously broadcast Fresno State Bulldog football and basketball games.

The Pappas stations have provided additional high quality, comprehensive program services to their markets, fulfilling the Commission's goals of localism and diversity in programming choices available to the public.

I. The Comments.

The Comments filed on March 29, 1993, in response to the Notice of Inquiry are primarily from six different interest groups. They are:

1. College Athletic Conferences;
2. Video Programming vendors, who acquire rights to sports events and supply programming for so-called basic cable, premium tier cable and pay-per-view cable service;
3. National television networks with cross-ownership interests in video programming vendors;
4. Superstations;
5. The NFL, Major League Baseball, and NCAA; and
6. The Association of Independent Television Stations, Inc. (INTV).

1. College Athletic Conferences.

The Comments by the Big East, Atlantic Coast, University Interscholastic, Colorado Athletic, Southwest and Colonial Athletic Conferences and those of the University of Denver and Special Olympics, Texas, are remarkably similar in format and thrust. Their Comments are, though, individually and collectively, not responsive to this Inquiry. None of the commenting conferences disclose the terms of their rights agreements and, specifically, whether or not their agreements contain preclusionary clauses, and, if so, what they say. To the best of PTC's knowledge, neither the Big 10, or PAC 10 Conferences, or the CFA, filed comments in this proceeding. Nevertheless, in order to provide the Commission with at least one actual such preclusive contract, PTC submits herewith, as Exhibit One, an excerpt provided by the Commissioner of the PAC-10 of its contract with Prime Ticket, which purportedly contains all relevant exclusivity conditions of that agreement.

PTC respectfully submits that this Exhibit One unmistakably describes certain limitations on availability of "local college sports programming to local television stations". However, in order to assure that the Commission is provided with a complete record and to demonstrate the actual application of that contract language to the detriment of the public interest, PTC submits as Exhibit Two a copy of PTC's lawsuit filed against the PAC-10 Conference, Prime Ticket Network, Oregon State University, Washington State University, Capital Cities/ABC, Inc., and others. This lawsuit is recently filed and has not yet gone to trial. PTC incorporates, by this reference, all of the allegations therein contained in these Reply Comments.

2. Video Programming Vendors.

The Comments of Viacom, Affiliated Regional Communications, Ltd., ESPN, Turner Broadcasting System, Inc., and Madison Square Garden Corporation, focus largely on the additional quantity and type of sports programming they offer that they purport would not otherwise be available to consumers. They do not, however, describe with any specificity whether or not their contractual arrangements have had the effect of reducing the supply of local college sports events broadcast on local stations.

Nor does Rainbow Programming Holdings, which operates SportsChannel, or Time Warner, deal with this core question, (among others), in this Inquiry. To shed some light on why this may be, PTC submits, as Exhibit Three, a copy of a lawsuit which PTC filed October 24, 1991, against SportsChannel, the Big West Conference and others. The lawsuit was settled in less than one week after its filing with the reimbursement of all PTC's legal costs, and an arrangement which mitigated substantially what would otherwise have been a loss to KMPH (TV)'s audiences of Fresno State University football game broadcasts. In addition, PTC submits, as

Exhibit Four, a copy of a newspaper ad that was placed jointly by KMPH (TV) and two other Fresno market television stations, after Prime Ticket and ABC, by dint of the preclusionary clauses in their contract with the PAC-10 Conference, prevented KMPH (TV) from broadcasting, to its home market two Fresno State away games, neither of which ABC or Prime Ticket were broadcasting or cablecasting. In the 1991 season alone, KMPH (TV) was twice affected by preclusive clauses in broadcast network and cable network agreements and by pre-emptive clauses between a video programming vendor and a conference. The effect of the latter clause is not just to give first call to collegiate sports telecasts to a premium tier video programming vendor to college football and basketball games that have heretofore been offered for free, to all residents, urban and rural, rich and poor, alike in our coverage area. Worse yet, such clauses prevent the broadcast of college football and basketball games by local stations to the home market of the stations and of the universities located therein even though those games are not broadcast by either a broadcast network or a cable network or anyone else to anyone. PTC is mindful that this Nation's Communications Act, this Commission and the anti-trust statutes do not exist for the purpose of protecting or enhancing PTC's economic interests. Rather, their purpose is to promote diversity and competition of the most and the best in program services at the least cost to the American public. Such preclusionary clauses as these betray that mandate and exist only to reduce output, i.e., the availability of games, increase cost, i.e., by forcing the public to a venue, cable, which costs them money to see some sporting events, even though the events they most prefer are withheld from them to line the pockets of the greedy.

While Rainbow admits that their "SportsChannel generally compete against non-network television stations for the rights to telecast (sic) local sporting events." their assertion that they have not "siphoned" programming away from broadcasters is simply, demonstrably untrue. See Exhibit Three, supra. Even the foregoing statement

is misleading. It is generally understood that "telecast" means to broadcast to all persons, non-subscribers and cable subscribers alike. SportsChannel cablecasts only to those who pay. SportsChannel and the other video programming vendors beat their breasts just too much. No one, PTC included, would disagree with circumstances which lead to additional sporting events being offered by video programming vendors which free, universally available broadcast television had not or did not provide to its audiences. But where broadcasting is prevented from carrying events it has historically broadcast by outright blackout clauses, such as are a part of the ABC/CFA agreement and a part of the video programming vendors, or network, agreements with college Conferences, it is just plain wrong.

SportsChannel and others posit that "to the extent that fewer sporting events are available on broadcast television, that is often the result of decisions made by the broadcasters, or team owners themselves." This bald, self-serving statement is sheer untruth. Not one bit of supporting incontrovertible evidence is presented, for none exists, that broadcasters have willingly reduced the carriage of sports events they have heretofore broadcast. Arguendo, if it is true that some Fox affiliates have chosen to carry less sports, then other independent broadcast stations in the same market would obviously carry that event which had been demonstrated to be popular with market audiences.

SportsChannel makes the argument that "broadcasters have substantial advantages in bidding for any programming, including sports programming . . . (because) broadcasters have access to 100 percent of the households." What SportsChannel doesn't tell the Commission is that because of that universal and free service, the cable networks, just like ABC and NBC, (which control or own most of ESPN and SportsChannel), have insisted on the preclusive contract conditions. These exist, as John Severino, former president of Prime Ticket, which controls the PAC-10 television rights in concert with ABC, told Harry J. Pappas in September,

1991, because "Cable systems pay us big money so they can tell the public, "If you want to see PAC-10 games, you've got to subscribe to cable and you've got to have the Prime Ticket service."" While Mr. Severino may now regret his candor, he can neither deny having made the statement nor that it simply reflects the truth of what cable is up to. The cable sports vendors (and ABC-TV) not only want to have the sports events that previously proved their popularity on free television, they want to concurrently deny local broadcasters the ability to broadcast sports events, which cable sports vendors, or ABC-TV don't carry, which are more popular in the broadcaster's home market. The Comments of Turner Broadcasting System include an instructive statement on this point. While the content of the statement relates to duplicated baseball game telecasts (see Turner Comments, pages 9 and 10), the point is true about home market preferences. Says Turner, "Fans prefer their home team and their home team announcers".

In PTC's experience, our broadcast of Fresno State Bulldog football or basketball games have always been more popular than network broadcasts of other non-local college sports. It is because of such popularity, such consumer demand, that preclusive contract conditions exist; the object is to deny the consumer that which he or she most wants so that they'll watch what is secondarily desired. Moreover, if they can be made to pay, then, say the greedy, so much the better.

PTC respectfully requests that the Commission weigh the undeniable facts that, in respect of the games issue in the lawsuits described in Exhibits Two and Three, the viewing audiences wanted to see them more than any other team event; Fresno State wanted them broadcast and had contracted with KMPH(TV) to do so; KMPH (TV) wanted to broadcast them; KMPH (TV) was prevented from showing three out of four of the games; and, those games were not telecast, or cablecast by anyone to anyone in our service area. No one, not even an economic theorist, can stretch to call that examples of consumer welfare.

III. THE PAUCITY OF BROADCASTERS COMMENTS

The Association of Independent Television Stations, Inc. (INTV) filed truly responsive Comments in this proceeding and provided numerous examples of sports migration and the effects of preclusive contracts. Regrettably, no other individual stations filed Comments. PTC believes one reason should be carefully considered by this Commission. PTC submits that the ownership records of the Commission, of which Official Notice is taken, demonstrate that a substantial number of such stations, which have carried such sports programming in the past, are cross-owned by entities with stakes in cable system ownership, video programming vendor ownership, and other ties which render the stations mute insofar as responding to this Notice of Inquiry. PTC requests that this Commission, in order to adduce all information which it requires in order to fulfill Congressional mandate, should order all U.S. television stations, the networks and others over whom it has jurisdiction to produce answers to the issues and questions posed by the NOI. Absent that, this proceeding will produce a paltry and misleading record insufficient to allow this Commission to meaningfully and substantively report to Congress. The silence from broadcasters cannot, by any reasoning person, be interpreted to mean no problem exists. In fact, that deafening silence is but one more proof of the insidious problem. One executive of a very large market television station, who wanted to join in complaining about the ESPN-MLB Wednesday night blackout, and possibly joining in litigation, was informed by his bosses that he would be jeopardizing his job if he did so. Why?? The parent is a substantive cable MSO, which doesn't want to offend others in the cable cabal. If required by the Commission to disclose the identity of the person, I would do so, but with fear that his livelihood would be the forfeit.

IV. CONCLUSION

This Commission should not be misled by the self-serving statements of cable, the networks, conferences and leagues. Siphoning of events from free, universal over-the-air television has occurred. Migration, which some commentators averred has not occurred, means "to move from one place to another." (Webster's Dictionary). Not only has sports programming moved from free television to a medium, cable, which in any of its forms, costs money, but worse yet, preclusive clauses, which are not event exclusivity, keep the public from viewing that which they have historically been able to view . . . for free.

This Commission should be outraged that individual broadcasters have not accorded this Commission and the Congress the truthful, complete (albeit disserving to narrow self-interest) record this Commission seeks to compile.

PTC most respectfully prays this Commission to act immediately to compel the production of all facts from all parties. Sufficient time exists to do so. The Commission has the authority to do so. The public interest which this Commission and the undersigned seek to serve requires no less.

Respectfully submitted,

PAPPAS TELECASTING COMPANIES

By: Harry J. Pappas
Harry J. Pappas, Chief Executive Officer

EXHIBIT ONE



THOMAS C. HANSEN, COMMISSIONER
800 SOUTH BROADWAY, SUITE 400
WALNUT CREEK, CA 94596
PHONE: (415) 932-4411
FAX: (415) 932-4601

Advanced by Facsimile

September 30, 1991

Mr. Harry J. Pappas
President, Pappas Telecasting, Inc.
Station KMPH
5111 E. McKinley
Visalia, California 93727

Dear Harry:

Here are the pertinent portions of the Pacific-10 Conference's contract with Prime Ticket Network.

Sorry for the delay—I forgot when we were on the phone I was going to be out of the office most of Thursday and all of Friday. I just couldn't get this done.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tom", written in dark ink.

Thomas C. Hansen

TCH:tln

Signed

PACIFIC-10 CONFERENCE/PRIME TICKET NETWORK
CABLE TELEVISION AGREEMENT

This Agreement is made to be effective as of September 25, 1989, at Walnut Creek, California, by and between the Pacific-10 Conference, a California non-profit association, comprised of ten institutional members set forth in Schedule A, ("PAC-10"), with its conference office located at 800 South Broadway, Suite 400, Walnut Creek, California 94596, and Prime Ticket Network, a California Limited Partnership ("PTN"), with its offices located at 401 South Prairie Avenue, Suite 104, Inglewood, California 90301.

1. **Grant of Cablecasting Rights.** The PAC-10 hereby grants to PTN the right and license to present throughout the United States, preferably on a live basis, cablecasts* of twelve (12) Saturday PAC-10 football games per year, one per week commencing the first week in September and continuing through the third week in November, and thirty-five (35) other PAC-10 events throughout the academic year exclusive of men's basketball. PTN

that year, following, as available time periods permit, the mix of sports recommended by the PAC-10. When indicating to the PAC-10 the events selected by PTN for cablecasting, PTN shall also indicate the times at which it wishes to have such events held. It is the desire of the PAC-10 that intra-Conference events be

During the exclusive time period specified above, neither the PAC-10 nor any PAC-10 member institution shall permit any other telecasts or cablecasts of any game or event hosted by a PAC-10 member institution (or for which a PAC-10 member institution holds or grants the television/cablecasting rights) to be presented in any television or cable television medium, live or delayed, except for a closed circuit football telecast presented on its campus or to alumni clubs.

PTN and the PAC-10 may mutually agree in writing to waive a PTN exclusive cablecasting period on an event-by-event

EXHIBIT TWO

Gary E. Cripe, Bar No. 076154
CRIPE & GRAHAM
2436 N. Euclid Avenue
Suite 5
Upland, California 91786
(909) 981-5212

Attorneys for Plaintiff
PAPPAS TELECASTING, INC.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PAPPAS TELECASTING, INC. a,
California corporation, and as
Public Trustee,

Plaintiff,

v.

PRIME TICKET NETWORK, a
California Limited Partnership,
BILL DANIELS, JOHN SEVERINO,
JERRY BUSS, The PACIFIC-10
CONFERENCE, a California
non-profit association, OREGON
STATE UNIVERSITY, WASHINGTON
STATE UNIVERSITY, CAPITAL
CITIES/ABC, INC., a New York
corporation, ABC SPORTS, INC.
a New York corporation, and
DOES 1 through 20, inclusive,

Defendants.

CASE NO. CV-F 92-5589-OWW

FIRST AMENDED
COMPLAINT FOR DAMAGES

DEMAND FOR JURY TRIAL

PLAINTIFF ALLEGES AS FOLLOWS:

JURISDICTION AND VENUE

1. Jurisdiction over this action is conferred by §§ 4,
12 and 16 of The Clayton Act, 15 U.S.C. §§ 15, 22 and 26; 28
U.S.C. § 1337 (laws regulating commerce); and principles of

1 ancillary and pendant jurisdiction.

2 2. Each defendant resides, is found, has an agent, or
3 transacts business in this judicial district. The acts alleged
4 herein have been and are being carried out and made affective
5 within this judicial district, and have their affect both within
6 this judicial district and elsewhere in interstate and intrastate
7 commerce. The contracts between plaintiff and defendants
8 Washington State University and Oregon State University, not
9 defendants herein, were negotiated and were to have been
10 performed, in part, within this judicial district. Venue in this
11 district is proper pursuant to 28 U.S.C. § 1391(b) and (c), and
12 15 U.S.C. §§ 15 and 22.

13
14 **THE PARTIES**

15 3. PAPPAS TELECASTING, INC. (hereinafter "PAPPAS") is
16 a California corporation and is the licensee of commercial
17 television broadcast station, KMPH-TV Channel 26 (hereinafter
18 "KMPH"). KMPH broadcasts free, over the air television service
19 to the cities of Fresno, Visalia, Bakersfield and other smaller
20 cities in rural areas in the San Joaquin Valley of California.
21 The corporate headquarters of PAPPAS are located in Visalia,
22 California and the offices for KMPH are located in Fresno,
23 California. PAPPAS sues defendants herein in its dual capacity
24 as licensee of KMPH and as a public trustee as mandated by the
25 Federal Communications Commission ("FCC"). Harry Pappas
26 (hereinafter "Mr. Pappas") is the president and owner of Pappas.

27 4. Plaintiff is informed and believes and thereupon
28 alleges that defendant PRIME TICKET NETWORK ("PTN") is a

1 California Limited Partnership and that defendant CVN, Inc.
2 ("CVN") is a General Partner of PTN. Plaintiff is further
3 informed and believes and thereupon alleges that defendant PTN,
4 whose principal business is that of a national, premium tier,
5 sports, cable carriage network with its principal place of
6 business in Inglewood, California, acts, inter alia, as a
7 distributor of sports programming to regional cable services
8 located throughout Southern California, Arizona, Hawaii and
9 Nevada and serves thereby its approximately 4,200,000
10 subscribers. Plaintiff is further informed and believes that the
11 principal place of business of defendant CVN is Carlsbad,
12 California.

13 5. Plaintiff is informed and believes and thereupon
14 alleges that defendant PACIFIC-10 CONFERENCE ("PAC-10") is a

1 Athletic Association ("NCAA").

2 6. Plaintiff is informed and believes and thereupon
3 alleges that OSU, not named as a defendant herein, is a land
4 grant college supported by the taxpayers of Oregon with its
5 principal place of business located in Corvallis, Oregon.

6 7. Plaintiff is further informed and believes and
7 thereupon alleges that Washington State University, not named as
8 a defendant herein, is a land grant college supported by the
9 taxpayers of the State of Washington with its principal place of
10 business located in Pullman, Washington.

11 8. Plaintiff is informed and believes and thereupon
12 alleges that defendant Capital Cities/ABC, Inc. and its
13 predecessor in interest American Broadcasting Companies, Inc.
14 (hereinafter "CAP CITIES/ABC") is a New York corporation with its
15 principal place of business in New York, New York. CAP

1 million television households.

2 9. Plaintiff is informed and believes and thereupon
3 alleges that defendant ABC Sports, Inc. (hereinafter "ABC
4 Sports") is a New York corporation with its principal place of
5 business in New York, New York. Plaintiff is further informed
6 and believes that defendant ABC Sports is a wholly owned
7 subsidiary of defendant CAP CITIES/ABC and is engaged, primarily,
8 in sports programming throughout the United States.

9
10 CO-CONSPIRATORS AND AGENTS

11 10. Plaintiff is informed and believes and thereupon
12 alleges that various corporations, associations, entities and
13 individuals not named as defendants in this action have

1 alleged herein by plaintiff.

2
3 RELEVANT MARKET(S)

4 12. The relevant product market involved in this
5 action is that for the rights to present television programs of
6 real time ("live") football games played among major college
7 football institutions in the United States. Relevant submarkets
8 are the televising of live college football played among major
9 college football institutions on Saturday afternoons and Saturday
10 evenings, and so-called "cross-over" games between members of
11 defendant PAC-10 and members of other football conferences and
12 independents.

13 13. The relevant geographic market is nationwide.
14 Relevant submarkets are each of the 60 largest standard
15 metropolitan areas of the United States and the area of dominant
16 influence ("ADI") of KMPH defined herein as the Counties of
17 Fresno, Kern, Kings, Madera, Tulare, Mariposa, Merced,
18 Stanislaus, San Benito, San Luis Obispo and San Joaquin,
19 California, and the service markets of defendants PTN, CAP
20 CITIES/ABC and ESPN as hereinabove alleged.

21
22 INTERSTATE COMMERCE

23 14. The parties to this action engage extensively in
24 interstate commerce, and the illegal conduct of defendants as
25 alleged herein, takes place in and substantially affects
26 interstate commerce and the televising of live college football
27 games is in and affects interstate commerce. Defendants CAP
28 CITIES/ABC, ABC SPORTS and ESPN broadcast or cable carry

1 programs, including intercollegiate football games, on a
2 nationwide basis and derive advertising revenues from companies
3 which sell their products and services nationwide added by the
4 exposure their products receive during commercial breaks of
5 televised and cable carried live college football games. PTN
6 cable carries college football games to its service area and
7 derives advertising revenues from companies which sell their
8 products and services among the several states of the United
9 States. Defendants PTN and ESPN derive revenues from consumers
10 who pay fees for their cable services located within the several
11 states of the United States. The member universities of
12 defendant Pac-10, including WSU and OSU, and Fresno State
13 University ("FSU"), not named as a defendant herein, are able to
14 recruit student athletes on a nationwide basis because, in part,
15 of the television exposure their programs receive, and they
16 derive alumni contributions to both their academic and athletic
17 programs from alumni located nationwide. Many of the athletic
18 contests between member institutions of defendant PAC-10, and
19 non-member institutions, including those which are the subject
20 matter of this lawsuit, require interstate travel and commerce.
21 Plaintiff derives approximately fifty percent (50%) of its
22 advertising revenue from advertisers which sell products and
23 services nationwide. The wrongful conduct alleged herein which
24 restricts output of live television broadcasts of college
25 football games affects interstate commerce because, inter alia:

26 (a) The price paid by advertisers for commercial
27 time during defendants broadcasts and cablecasts is an
28 artificially high price, which price they, in turn,

pass on to consumers of the products and services they sell;

(b) The restriction of output reduces the amount of television exposure to both members of defendant

CONFIDENTIAL